



## LIBERTY AND SECURITY IN THE AGE OF TERRORISM: NEGOTIATING A NEW SOCIAL CONTRACT

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### **Abstract:**

The prevalent rise in terrorism related attacks and the susceptibility of the State to such attacks has, in an effort to counter future threats and neuter the ability of terrorists, brought to the fore the tensions between liberty and security. Ironical as it might seem the values that made western democracies the shining examples of free and rules governed societies are the same values that provide fertile ground for planning and executing horrific acts of terror. Taking a historical look at the concepts of security and liberty, this paper aims to understand if these ideals can still co-exist in a paradoxical relationship in face of the huge threats from terrorism.

**Keywords:** terrorism

### **Introduction**

Over generations, there is a continuingly difficult relationship between two very important ideals to every democratic society; Liberty and Security. As important as these two are in practice, they often exist in a paradoxical relationship. There is ample literature on these ideals from the last 300 years notably Thomas Hobbes and John Locke who both served as the canon for future theorists and discussions on each of the concepts. A common assumption is that security i.e. the protection of the individual and also of the state is fundamentally threatened by terrorism, and the state no longer has the monopoly on violence. In response to these increased threats, Governments have had to introduce measures and take steps that encroach on civil liberties and certain individual rights that democratic societies are built on. The resultant effect has been a promise of increased

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security or safety for less liberty, an argument that both ideals, while equally important have to be balanced effectively.

This research will take a historical look at the theoretical concepts of these ideals and how both have co-existed over the centuries, especially in times of crisis or emergency. Using the works of Hobbes and Locke as a backdrop to understanding the essence and meaning of the concepts, the research delves into the debate theoretically and practically.

## **1 Liberty and Security: Conflicting Virtues**

Claims for liberty in the modern world often run up against the counter demand for security while much of the discussion and practices surrounding security centres on its relationship and effect on liberty. Explicitly or implicitly, the common held assumption is that citizens must forego a certain amount of liberty in return for the desire for security and that in providing this security, states need to constantly reduce the liberties of their citizens.

Currently the terms 'Liberty' and 'Security' are often analysed against the backdrop of terrorism and declining freedom. The paradox presented in reconciling the two ideals is that acts of terrorism thrive or appear to thrive in democratic societies as protected individual liberties such as freedom of association, movement and expression which are perceived as conducive to planning and executing acts of violence. The debate has been thought out in terms of what direction the balance should be tipped between security and liberty. On the one hand is the argument in favour of security, promoting an approach willing to sacrifice liberty to the needs of the State. The needs of the individual some argue should not get in the way of the exigencies that the moment demands.<sup>2</sup> On the other hand are those who reject as false, the choice between security and liberty. They propound that excessive violations of civil and individual liberties in the name of national security undermines the high ground that democratic societies occupy in the fight against terrorism.<sup>3</sup> The majority of these debates have been defined in ways of achieving a proper balance. The balancing theorists reject the call to treat interests as absolutes, which should never be balanced off against other interests. Worth mentioning also is the Utilitarian school of thought who argue that the morally right action is the action that produces the best good, it is best understood as a form of consequentialism, where the right action is understood entirely in terms of the consequences produced. This theory contrasts with beliefs of individual rights in that it is

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<sup>2</sup> See Posner R., *'Not a Suicide Pact: The Constitution in a Time of National Emergency'* (2006, Oxford University Press).

<sup>3</sup> David Cole D., 'The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11' (2007) 59 *Stanford Law Review* p.1735.

generally willing to trade off the rights of the individual for the happiness of the greatest number.

### ***Liberty and Security: What Do They Mean?***

Liberty and Security are very vague words that can be confusing and ambiguous as to what they mean. The former can range from a wide definition of pertaining to the quintessence human freedom, to a much narrower meaning of being able to do what one wants at any given time. It could also be thought of as only concerning the individual, and at other times, about an individual as part of society at large. It could also imply the need to let be by authority as well as being an active participant in one's government.<sup>4</sup>

Security is equally a hazy word, in that it could connote different meanings in different contexts considering there are many insecurities individuals have deal with.

Thomas Hobbes, the most prominent thinker on the topic of security would serve as an anchor on any modern discussion but even he did not subject the concept of security to any extensive analysis. His passage from *Elements of Law* asserts that:

A man may... account himself in the estate of security, when he can foresee no violence to be done unto him, from which the doer may not be deterred by the power of that sovereign, to whom they have every one subjected themselves; and without that security there is no reason for a man to deprive himself of his own advantages, and make himself a prey to others.<sup>5</sup>

This appears to be his only attempt to define the word beyond this, he says very little as to the actual meaning of security. When these words are used together historically, it has been taken to refer to national security, the protection from external attacks as well as internal threats to geographical locations organised as states. Subsequently, this orientation has led to the counter terrorism field and geared security towards protection from attack. Jeremy Waldron points out that it is easy to confuse national security as an idea about the integrity and power of the state which may often not be concerned with the citizens being more secure.<sup>6</sup> Security in the context of this submission implies the people becoming safer rather than governmental institutions being more powerful. The uncertainties over the meaning of these words do not detract from their positive powers. While Liberty implies freedom and a life lived without constraint, security allows for the space to live such life, protecting it from any threat or intrusion that might interfere or make its success impossible.

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<sup>4</sup> Gearty C., 'Escaping Hobbes: Liberty and Security for Our Democratic (Not Anti-Terrorist) Age' *LSE Law, Society and Economy Working Papers* 3/2010

<sup>5</sup> Hobbes T., *The Elements of Law, Natural, Politic* (1994, J.C.A. Gaskin ed, Oxford University Press) p.111.

<sup>6</sup> Waldron J., 'Safety and Security', (2011) 85 *Neb. L. Rev.* 454

Of note also is the concept of two types of liberty; Positive and Negative liberty. Negative liberty is described as preserving more individual autonomy by positing freedom from restraints by the State, the absence of obstacles or barriers except when it is actually necessary or essential. Positive liberty on the other hand is not just the freedom from constraint, but a broader idea, the possibility of taking control of one's life and acting to realise one's central purpose.<sup>7</sup> While the first suggest the absence of something, the latter implies the presence of something.

### ***Thomas Hobbes on Security***

Thomas Hobbes and Jeremy Bentham are arguably the two philosophers to have written the most on the topic of security. For Bentham 'the care of security was the principal object of the law'<sup>8</sup> but what Bentham meant when he talked about security was a kind of legal certainty and constancy as well as predictability as far as rights over property are concerned. Hobbes however was an 'absolutist', for him, the whole purpose of political enterprise was security; it is to guarantee security from each other and from strangers that we set up a sovereign. He saw liberty in simple terms, the capacity to act or to refrain from acting, which in turn produces a decision, the will to act or not to act as the case may be.<sup>9</sup> In a world of 'blameless liberty', it is natural for man to desire what is good for him and avoid what is bad for him and as far as Hobbes was concerned, highest in all this is fleeing from death. Thus, it is reasonable to expect man to want to preserve himself at all cost. The consequence of this is that it will be chaotic for all men to be simultaneously satisfied. To escape this eventuality and because absolute liberty is practically impossible, man has to oblige himself from acting according to his will and submit to the protective force of a sovereign power. The desire for security thus, leads man to submit to a sovereign's command and give up his natural liberty.<sup>10</sup> Hobbes highlighted that the understanding between man and the sovereign, achieves peace through a social contract rather than what would be a perpetual war in Hobbes' fictional state of nature. It guarantees security for the subjects as well as for the sovereign. In terms of contemporary politics, this illustrates how the position taken by Hobbes overwhelmingly pushes the balance in favour of security.

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<sup>7</sup> Carter I., 'Positive and Negative Liberty', *The Stanford Encyclopedia of Philosophy*, (Spring 2012 Edition), Edward N. Zalta (ed.), < <http://plato.stanford.edu/entries/liberty-positive-negative/>> accessed 3 January, 2014.

<sup>8</sup> Bentham J., *Principles of Civil Code, in The Theory of Legislation* 88, 109 (C.K. Ogden ed, 1931).

<sup>9</sup> Gearty C., '*Escaping Hobbes; Liberty and Security for our Democratic (Not Anti-Terrorist) Age*', LSE Law, Society and Economy Working Papers 3/2010.

<sup>10</sup> Waldron, 'Safety and Security'.

### **Locke on Liberty**

For John Locke, the natural liberty of man is to be free from any superior power on earth. He theorised that the state of nature is a state of 'perfect liberty' with no 'absolute or arbitrary power'. The aim then is to join a society where man's liberty can be secured and where citizens possess the right, should it be thought that liberty is being eroded to dissolve the government.<sup>11</sup> The great and chief end of men uniting into a society and submitting under a government is to preserve their liberty.<sup>12</sup> Locke, for this reasoning, is generally said to have established a position which pushes the balance towards liberty, as well as the protection of that liberty against its undermining by an arbitrary power.

### **The Relationship between Liberty and Security**

Benjamin Franklin famously said 'those who would give up essential Liberty, to purchase little temporary Safety, deserve neither Liberty nor Safety'.<sup>13</sup> To some extent, liberty requires security; one cannot be free if he or she is constantly harangued by people who might take one's property or life. Locke argued that the purpose of government was to create some kind of security for those things that would allow for liberty, specifically that government should provide for security of life, liberty and property.<sup>14</sup> Once all of these are secure, then one can begin to use his liberty effectively. It is widely acknowledged that Liberty and Security are trade-offs, the more security we get, the less liberty we are going to have. As Philip Bobbitt succinctly puts it

'There is virtually a universal conviction that the constitutional rights of the People and the Powers of the State exist along an axial spectrum. An increase in one means a diminution of the other. On this spectrum we imagine a needle oscillating between two poles, moving toward the pole of State's power in times of national emergency or toward the pole of the People's liberty in times of tranquillity'.<sup>15</sup>

The question then is what is the threshold beyond which we should not go? In a situation of unending 'war on terrorism', is the pendulum permanently swung in favour of security to liberty's detriment? Recent development would suggest an incredibly high price is being paid in the name of security. Thomas Jefferson in turn states:

'The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the laws, is easy of solution in principle, but sometimes embarrassing in practice. A strict observance of the written laws is doubtless **one** of the high duties of good citizen, but it is **not the**

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<sup>11</sup> Neocleous M., 'Security, Liberty and the Myth of Balance: Towards a critic of Security Politics' [2007] *Contemporary Political Theory* pp.131-149.

<sup>12</sup> Locke J., 'The Second Treatise of Government' (J.W Gough ed, 3<sup>rd</sup> edn, Basil Blackwell, 1976) ch.IX, para.124.

<sup>13</sup> Labaree L., *The Papers of Benjamin Franklin*, Vol. 6. (1963, Yale University Press).

<sup>14</sup> Locke, 'The Second Treatise of Government'.

<sup>15</sup> Bobbitt P., 'Terror and Consent: The Wars for the Twenty-First Century'. (Alfred A. Knopf, 2008) p.241.

**highest.** The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.<sup>16</sup>

In his most famous work *Leviathan*, Hobbes wrote that 'a free man is he, that in those things, which by his strength and wit he is able to do, is not hindered to do what he has a will to'<sup>17</sup> suggesting that choosing not to do something because of the fear of its consequence does not mean an individual is not free to do it, it is merely that he does not want to do it. As such, an individual remains free even if he lives under a despotic regime.

Chief among the excuses for the erosions of civil liberties in western democracies is the real or perceived threat from terrorism. The attacks of September 11 2001 on the United States and citizen's demands for an effective response exerted understandable pressure on the government among western democracies. In the subsequent war declaration, a number of laws were made, many of which undermine the societal fabric built upon the concept of liberty. Individual Liberties became casualties of the 'war on terror'. Easy as it is to dismiss the State's effort to confront the real or perceived threats as liberty traducing power grabs, the salient and important question is how should the law deal with crises?

In spite of Locke's perceived absolutism in favour of liberty, what appears to be continuously overlooked by commentators is that even he allows room for discretion because the protection of life and property as well as other public goods may sometimes call for immediate action. He noted that for the good of society, some power ought to be left in the hands of the executive to exercise to allow them to deal with 'accidents and necessities'.<sup>18</sup> He articulated this in a powerful way when he wrote that this power can be exercised without the prescription of the law, and sometimes even against it, the only way of recourse for those who would challenge the exercise of this power would be in an appeal to heaven or a violent revolution as a last resort if their numbers are sufficiently large.<sup>19</sup> With this proposition, Locke introduced into his argument room for the carrying out of swift and flexible actions that are not within the law of the State: A magistrate may 'restrain or compel', 'command or forbid' particular actions for no other reason than 'the necessity of the state and the welfare of the

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<sup>16</sup> Jefferson T., 'Letter from Thomas Jefferson to John B Colvin, 20 September 1810', in Paul Leicester Ford (ed), *The Works of Thomas Jefferson* (New York: GP Putnam's Son's 1905), vol.11, p.146.

<sup>17</sup> Hobbes T., *Leviathan* [1651] (Cambridge University Press, 1991) ch. XXI.

<sup>18</sup> Neocleous, 'Security, Liberty and the Myth of Balance'.

<sup>19</sup> Locke J., *Two Treaties of Government* [1690] (Cambridge University Press, 1988), p.160.

people called for them'.<sup>20</sup> This reveals an early understanding from theorists that the ideal of human and individual liberty can sometimes be secondary to the demands of state necessity. Admittedly, Locke intended the exercise of this power be restricted to foreign affairs as opposed to internal affairs, he conceded that they are almost inseparable and are always almost united.<sup>21</sup> Of note here is that the foremost theorist on Liberty opened the door to compromise it, when he admitted that a State can take any action it deems right as long as it is done for reason of state necessity and/or of public good even an act of illegality. Between the sixteenth and twentieth century, this doctrine has morphed into 'Interest of the state, 'security of the state' and finally into 'national security'.<sup>22</sup>

## 2 Emergency Powers

Carl Schmitt has said in *Political Theology*

The exception is more interesting than the rule. The rules prove nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.<sup>23</sup>

How should the law deal with crises? Epitomised by the 'ticking time bomb' scenario, should legal restrictions apply to interrogation? Can a suspect be tortured? While the rule of law is based on the consistent application of rules, there are numerous examples of departures from the rules in societies that embrace its principles. Unsurprisingly, the tensions exposed have confronted these societies and raised important legal questions.<sup>24</sup> In legal theory, emergency powers have also proved somewhat difficult to understand, hence Schmitt's argument that the existence of exceptions to the rule of law undermines the very foundation upon which it is based.<sup>25</sup> The history of emergency powers can be traced back to the Roman Empire's institution of dictatorship, where in times of crisis, the senate appoints a dictator who possesses extraordinary powers including that of life or death and most importantly, had immunity for his actions.<sup>26</sup> The English common law's traditional approach to emergency is the invocation of martial law which is based on the right of the sovereign to protect its very existence, including detention without trial and the use of military tribunals. However, the rise of parliamentary sovereignty and the weakening of the royal prerogative have placed more

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<sup>20</sup> Locke J., (1997) 'An Essay on Toleration' (1667), in M. Goldie (ed.) *Political Essays*, (Cambridge University Press 1997).

<sup>21</sup> Neocleous, 'Security, Liberty and the Myth of Balance'.

<sup>22</sup> See Neocleous M, *Imagining the State*, (Open University Press, 2003).

<sup>23</sup> Schmitt C., 'Political Theology: Four Chapters on the Concept of Sovereignty' [1922], translated by George Schwab (Cambridge, MA: MIT Press, 1985) p.15.

<sup>24</sup> See *Liversidge v Anderson* [1942] AC 206.

<sup>25</sup> Schmitt, *Political Theology*, pp.13-14.

<sup>26</sup> Clinton R., 'Constitutional Dictatorship: Crisis Government in Modern Democracies' (2002 Transaction Publishers) p.57.

emphasis on legislative response to emergencies.<sup>27</sup> The United States constitution makes no explicit provision for emergency powers however, the suspension of the constitution in exceptional circumstances is acknowledged: the power to suspend the writ of habeas corpus 'when in cases of rebellion or invasion, the public safety may require it'.<sup>28</sup> In the absence of such provision, emergencies can only be responded to via legislation which then remains law after the emergency is over unless sunset clauses are inserted. The risk of such is that it could often pander to public sentiment and emotions as the government responds to political pressure in times of crisis, leaving no room for extensive debate on the provisions and language of such legislation and more often than not, the laws passed under emergency rule encroach on individual liberties and whenever liberties are lost, they are soon forgotten as a result of a normalisation process that automatically occurs and blends those measures into the legal system. For example, the Vagrancy Act 1824 was a wartime legislation that shaped the life of peasants for more than a century. In more recent times, National identity cards, a World War II measure, introduced under the National Registration Act 1939 remained law until 1952.<sup>29</sup> During the debate on the renewal of the Prevention of Terrorism (Temporary Provisions) Act 1976, Jim Marshall MP commented on this normalisation trend:

Quite apart from the anxiety about the way in which the Act is applied, there is added danger that long-term acceptance of its provisions will corrupt our democratic system. I believe that there is evidence that this has begun to happen. The power to detain suspects for seven days, which produced a shock on both sides of the House in 1974, now hardly causes an eyelid to flutter..... This is an example of an insidious circular process in which draconian laws soften us up for similar laws which become the desired standard for further measures.<sup>30</sup>

Some theorists of emergency powers can be divided into three camps, the first camp are those who insist that the rule of law applies even in times of emergency, this position is mostly defended staunchly by judges and those steeped in the rule of law.<sup>31</sup> They contend that not even emergencies warrant departure from the rule of law.<sup>32</sup> The second camp accept some models of accommodation either through legislative or constitutional departures; this position reflects the prevalent adoption of emergency powers provisions in the constitution and also the chance to derogate from some of the obligations of human right

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<sup>27</sup> Victor R., *'Emergencies and the Limits of Legality'* (2008, Cambridge University Press) p.229.

<sup>28</sup> Issacharoff S and Pildes R.H., 'Emergency Contexts without Emergency Powers: The United States' Constitutional Approach to Rights during Wartime' (2004) *International Journal of Constitutional Law* p. 296.

<sup>29</sup> See *Wilcock v Muckle* [1951] 2 All ER 367

<sup>30</sup> HC Deb, Vol. 38, col. 361, Mar. 7, 1983

<sup>31</sup> Chesterman S., *One Nation under Surveillance: A New Social Contract to defend Freedom without Sacrificing Liberty*, (2011, Oxford University Press) p.47-48.

<sup>32</sup> See Antonin Scalia dissent in *Hamdi v Rumsfeld*, 542 US 507, (2004). Also Richard Posner, 'The Best Offence', *New Republic*, 2 September 2002.



treaties.<sup>33</sup> The third camp is those who contend that emergencies justify acting outside the rule of law. Francis Biddle, the US Attorney General during the Second World War put this view bluntly when he wrote about Roosevelt's administration decision to send thousands of Japanese Americans to internment camps 'the constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile, probably a long meanwhile, we must get on with the war.'<sup>34</sup> This view aligns closely with Schmitt's legal nihilism. It is striking however that established democracies rarely evoke emergency powers; the United States, Germany, Italy, Spain and Britain, all had to deal with terrorist threats over the last 50 years but have mostly responded through legislation. However, States such as Northern Ireland, Israel and Egypt who have had emergency powers on a long term basis<sup>35</sup> make the idea of emergency powers as exceptional meaningless. This brings us back to Schmitt's argument that in times of crises, 'the state remains, whereas law recedes' and that because of the likelihood of a crisis which would threaten the very survival of legal order, the sovereign decision maker ought to always have great latitude with the law, becomes more persuasive.

### **3 The United States and United Kingdom's Response to Terrorism**

Following the September 11 2001 attack on the United States, the US congress passed a raft of measures aimed at countering terrorism. Most of these measures have been described by commentators as a panicked response, hastily put together with little understanding of an undefined threat<sup>36</sup> and display the extent to which response to a crisis can seriously disrupt the relationship between the security of the state and civil liberties. Issues surrounding the indefinite detention of unlawful combatants were considered by the United States Supreme Court in *Hamdi v Rumsfeld* where a majority of the court accommodated the Government's argument but Justice Antonin Scalia, in a vigorous dissent wrote that

whatever the general merits of the view that war silences the law or modulates its voice, that view has no place in the interpretation and application of a constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.<sup>37</sup>

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<sup>33</sup> Chesterman, 'One Nation under Surveillance' p.48.

<sup>34</sup> Baker T., Civil Rights and Civil Liberties in a Crisis: A Few Pages of History (2002) *Nevada Law Journal* 23.

<sup>35</sup> Lazar N.C., *States of Emergencies in Liberal Democracies* (2009, Cambridge University Press).

<sup>36</sup> Ackerman B., *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, 2006) p.2. See also Heyman P.B and Kayyem J.N, *Protecting Liberty in an Age of Terror* (MIT Press, 2005) p.5.

<sup>37</sup> *Hamdi v Rumsfeld*, (2004) 542 US 507, 578-9.

His position implies that constitutional structures ought to apply equally in the face of terrorist threats and it remains so in times of war and peace.

The UK Government's major response to terrorism has been a raft of Anti-Terrorism legislation with provisions that include more police powers to hold and question suspects.<sup>38</sup> The scale and savagery of the 2001 attacks on the US and the subsequent one in London in 2005 generated a sense that the current threat is different and more serious than previous terrorist activities. As with the United States, a new conception of response emerged, best encapsulated by then Prime Minister Tony Blair shortly after the July 2005 bombings in London that 'let no one be in doubt, the rules of the game are changing'.<sup>39</sup> The detention power in the 2001 Anti-Terrorism legislation later became a major legal and political battleground between the Government and civil liberties groups. The House of Lords in *A and Others v Secretary of State for the Home Department*<sup>40</sup> considered the reconciliation of citizen's rights and the preservation of National Security. Lord Hoffman in a scathing rebuke of the Government declared the detention unlawful, he held that freedom from arbitrary arrest and detention is a quintessentially British Liberty, enjoyed by every inhabitant of the country. He remarked that 'The real threat to the life of the nation comes not from terrorism but from laws such as these.'<sup>41</sup> Baroness Hale of Richmond in a similar vein, submitted that, 'Protecting the life of the nation is one of the first tasks of a Government in a world of nation states. That does not mean that the courts could never intervene. Unwarranted declarations of emergency are a familiar tool of tyranny'.<sup>42</sup> It is important to note however, that some of these measures are accepted with popular support. The chief reason for this is the deference to the wisdom of the executive during national emergencies and the clothing of liberty traducing measures in the language of balance.

#### **4 The Myth of Balance**

The language of balancing liberty and security is not new, it sustains because it explains and captures in simple language, the complex relationship and tension between two very key objectives of a responsible government. It is pervasive in political rhetoric as well as from leading legal intellectuals<sup>43</sup> and jurists,<sup>44</sup> with some suggesting that it is a distinct

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<sup>38</sup> Terrorism Act 2000, Anti-Terrorism Crime and Security ACT 2001, Prevention of Terrorism Act 2005, Counter Terrorism Act 2008, Terrorism Prevention and Investigations Measures Act 2011.

<sup>39</sup> *The Times*, 6 August 2005, p.1.

<sup>40</sup> [2004] UKHL 56.

<sup>41</sup> *Ibid* Lord Hoffman [97].

<sup>42</sup> *Ibid*. Lady Hale [226].

<sup>43</sup> 'There is a ] nearly universal elite legal academic view that we could indeed resolve all situations where there is a choice of norm by balancing conflicting considerations of one kind or another',

characteristic of entire legal systems.<sup>45</sup> The theories of constitutional interpretation are grounded in identifying, evaluating and comparing competing interests. In a judicial context, balancing is when an opinion is reached by analysing a question of the constitution and by identifying the interests in a particular case and constructing a rule of constitutional law by explicitly or implicitly assigning values to the identified interests.<sup>46</sup>

Although there might be debates about certain outcomes of balancing, there is almost a universal acceptance that there is a need for it with some suggesting that it is a component of the ultimate rule of law.<sup>47</sup> Its proponents argue that a balance ought to be struck between an individual's freedom to do whatever he or she wants and the need for the society to protect itself against any danger that may result from some of the things that the individual wishes to do. A major criticism of balancing is that it centres on a judge's ability to correctly identify competing interests and to rightly allocate them appropriate weight and compare those weights to the relevant interest. Determining the relevant factors to be considered in any case might be highly problematic.<sup>48</sup> It is argued that there are some interests that cannot be valued or measured by any common standard or on equal measure and as such should not be balanced against another interest.<sup>49</sup>

Also, in the majority of cases, the balancing test undermines predictability and does little in terms of general guidance than bright-line rules,<sup>50</sup> its subjective nature leads to decisions that are filled with the decision maker's personal preferences clothed in the language of objectivity.<sup>51</sup> Its scientific like rhetoric reduces the opportunity to engage in meaningful and extensive constitutional dialogue among the various branches of government, thus undermining constitutional law as an interpretative enterprise, transforming it into a general discussion on the reasonableness of government conduct.

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Duncan Kennedy in *From Will Theory to the Principle of Private Autonomy*: Lon Fuller's 'Consideration and Form', (2000) 100 *Columbia Law Review* pp.94, 96.

<sup>44</sup> Rehnquist W. H., *The Supreme Court: How it was, How it is* (2002 Vintage Publishers). See also R. Alexy, 'Balancing, Constitutional Review, and Representation', (2005) 3(4) *International Journal of Constitutional Law* pp.572-581.

<sup>45</sup> Bromhoff J., 'Balancing, The Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law' (2008) 31 *Hastings International & Comparative Law Review* p.555.

<sup>46</sup> Aleinikoff T.A., 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943.

<sup>47</sup> Beatty D., *The Ultimate Rule of Law* (2004 Oxford University Press) p.75. 2; Moller K, 'Balancing and the Structure of Constitutional Rights', (2003) 5(3) *International Journal of Constitutional Law* pp.453-468.

<sup>48</sup> Aleinikoff, 'Constitutional Law in the Age of Balancing'.

<sup>49</sup> Schauer F., 'Commensurability and Its Constitutional Consequences' (1994) 45 *Hastings Law Journal* p.785.

<sup>50</sup> Scalia A., 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175 at 1186.

<sup>51</sup> Aleinikoff, 'Constitutional Law in the Age of Balancing'.

### **Balance in Practice**

According to Philip Thomas, 'The idea of trading off freedom for safety on a sliding scale is a scientific chimera....Balance should not enter the equation; it is false and misleading'.<sup>52</sup> In the face of extreme violence and real or perceived emergency, the populace and the leader by extension are almost unlikely to be able to judge accurately the kind of risk the nation faces. In such circumstances, a balancing act between liberty and security is almost likely to be biased, in that the demand of accountability from political leaders is answered as long as they are seen to be doing something. For example, during the legislative debate on the Prevention of Terrorism (Temporary Provisions) Act following the Birmingham pub bombings in 1974, Brian Walden MP stated

The justification for it, to my mind, is overwhelming, and I make no bones about the fact that I shall not listen with too much patience to any anxieties about whether this or that or the other civil right may temporarily be somewhat abridged. Of course civil rights will.....The overwhelming mood in my constituency and I believe in my city, is one of vengeance.....They want revenge.<sup>53</sup>

Fuelled by a mood of vengeance and public outrage, such debate lacks rational discussion, which explains its mere seventeen hours of debate before approval. The ensuing 'balance' would overwhelmingly tilt in the direction of security with great loss of liberty.

The lockstep and mostly panicked reaction to terrorism attacks more often than not result in suppression of dissenting voices, and questioning the wisdom of the executive's response is deemed unpatriotic.<sup>54</sup> In the midst of a new national spirit focused on the singular cause of defeating the enemy, the freedom to express unpopular views usually suffer.

The true cost of balancing security and liberty in response to terrorism is that in practice, the social cohesion achieved through the common goal of defeating a common threat (terrorism) also leads to loss or suspension of cherished established rules and principles.<sup>55</sup> Risks related to national security are also, in general, susceptible to probability inflation because it involves the flow of information, usually the overestimation of threats, from the Executives to other branches of government and the general public, creating a greater deference to the wisdom of the Executive.<sup>56</sup>

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<sup>52</sup> Thomas P, '9/11: USA and UK' (2002) vol. 26(4) *Fordham International Law Journal*

<sup>53</sup> As cited *ibid* by Thomas, HC Deb, Vol. 882, col. 648-649, 28 November 1974.

<sup>54</sup> See John Ashcroft testimony to the Senate Judiciary Committee on the 6 December 2001 <http://www.justice.gov/archive/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm>

<sup>55</sup> Thomas, '9/11: USA and UK'.

<sup>56</sup> Masur J., 'Probability Thresholds' (2007) 92 *Iowa Law Review* 1293.

Also, the rhetoric of September 11 attacks in the language of war (War on Terror), greatly influenced and shaped the ensuing response. It could be argued that framing and presenting the threats posed by AL Qaeda in the language of crimes and criminal law would have led to a different outcome than employing of the language of war. Psychologists refer to this as 'anchoring', where the first number or message a decision maker is presented with usually has an effect on their eventual choice.<sup>57</sup>

The Director of Public Prosecutions later rejected the war rhetoric stating:

London is not a battlefield. Those innocents who were murdered on July 7, 2005 were not victims of war. And the men who killed them were not, as in their vanity they claimed on their ludicrous videos, 'soldiers'. They were deluded, narcissistic inadequates. They were criminals. They were fantasists. We need to be very clear about this. On the streets of London, there is no such thing as a war on terror. The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement.<sup>58</sup>

The notion that in times of emergency, individual liberties takes a backseat to securing the state and the populace at large suggests that it is a course that would be reversed as soon as such emergencies are over and the liberty citizen's enjoy will return to the pre-emergency state. However, this is hardly the case for those mostly targeted. Ronald Dworkin challenges the presumption that the general public willingly accepts the limitations on their freedom, arguing that, only a minority of people are affected by the new restrictions on freedom.<sup>59</sup> A careful scrutiny of the balancing test will reveal that the distribution is unbalanced, that the diminution in liberty affects some more than others, that it has been a trade-off of the liberties of a few against the security of the many.<sup>60</sup> Followers of Islam, immigrants (mostly of middle-eastern dissent) are the most vulnerable and possibly victimised group when the standard of justice is lowered. Most of the anti-terrorism police powers in the UK have been used disproportionately against the minority Muslim population, those arrested have been largely Muslims, a good number of whom were later released without charge, or charged with other offences unrelated to terrorism. Everyone indefinitely detained under the terrorism laws has also been Muslim.<sup>61</sup> A survey by the Metropolitan Police revealed that the number

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<sup>57</sup> Tversky A and Kahneman D., 'The Framing of Decisions and the Psychology of Choice' (2007) 211(4481). *Science New Series* (Jan. 30, 1981), pp.453-458.

<sup>58</sup> Sir Ken Macdonald, quoted in Lucy Bannerman, 'There is No War on Terror in the UK, Says DPP', *The Times*, 24 January 2007.

<sup>59</sup> Dworkin R., 'The threat to Patriotism' (2002) *New York Review of Books*, 21 February 2002.

<sup>60</sup> Waldron, 'Safety and Security'.

<sup>61</sup> Liberty., *The Impact of Anti-Terrorism Powers on the British Muslim Population*, (2004) available at <http://www.liberty-human-rights.org.uk/policy/reports/impact-of-anti-terror-measures-on-british-muslims-june-2004.pdf>

of Asians stopped and searched by the police rose 41% between 2001/2002 compared to 8% for the majority white population.<sup>62</sup>

Waldron also pointed out that when liberty is conceived as negative liberty, the diminution of liberty is attained by augmenting the power of the state. This is in order for the state to use these powers to combat terrorism. He noted that it would be naïve that this is the only thing the increased power of the state can be used for. The possibility of diminishing liberty also diminishing security against the state ought to be considered.<sup>63</sup>

Also of importance is the undertone dialect of 'us' versus 'them' in times of crisis. It explains a willingness to allow the Government greater latitude in exercising emergency powers because 'them' is a well-defined and easily separable group from the society at large.<sup>64</sup> Thus, when the state or society attempts to strike a balance between liberty and security during crisis, the fact that most targets of the anti-terrorism measures are perceived as outsiders, foreign or immigrants has really important implications. The more different 'we' are to 'them' and the greater the danger or threat 'they' pose to 'us', the greater in scope the powers assumed by the Government and the more tolerant the public become. Consequently, balancing takes place not between security and liberty as such, but rather between 'our' security and 'their' liberty. Thus, while the advantages of fighting and defeating terrorism are enjoyed by every member of the society, the costs of the actions taken to reach such end are mostly in a disproportionate amount, or sometimes exclusively borne by a distinct and well defined group of people or section of the society. The concept of trading freedom for safety or balancing liberty and security is false and misleading. Balance should not be part of the equation; it should instead be understood as reducing, in the name of security, the civil rights of possibly vulnerable people or groups who are identified as suspected terrorists.<sup>65</sup> The question is not what the majority middle class will sacrifice, they sacrifice little or nothing, rather, it should be what justice requires to be just.

## **5 The Social Contract**

The social contract is the idea that coercive political authority can be legitimised through some kind of pact.<sup>66</sup> It is a contractual relationship between the people and the State; for the state to provide order and comfort. Originally, formulated by Hobbes' in his most famous

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<sup>62</sup> *The Guardian*, 24 May 2004.

<sup>63</sup> Waldron, 'Safety and Security'.

<sup>64</sup> Elliot W.A., *Us and Them: A Study of Group Consciousness* (1986, The University Press) p.9.

<sup>65</sup> Thomas '9/11 USA and UK'.

<sup>66</sup> See David Boucher and Paul Kelly., 'The Social Contract and Its Critics', in David Boucher and Kelly (eds), *The Social Contract from Hobbes to Rawls* (1994, Routledge).

work, *Leviathan*, it centred on self-interest. To escape the miserable existence in the state of nature, individuals yielded their natural rights to political authority in return for peace and order. Anyone who accepts and enjoys the benefits of a stable government had in all essentials agreed to obey that government.

French Philosopher Jean-Jacques Rousseau is widely credited with the social contract concept, this as a result of his most famous work of the same title, *The Social Contract*.<sup>67</sup> Rousseau consolidated the idea into a model that is applicable to modern States, it was moderate in its execution and notable for lacking the extremism of Hobbes. He believes that man does not sacrifice freedom in adhering to the state because so much freedom can be gained from the state. Man, he believes, acquires moral freedom, civil society, which makes him a master of himself and that obeying a law one prescribes to oneself self is freedom. According to Gilmore, Rousseau envisaged the coming together of distinct men coming together to make a mutual commitment between one another and the government, thus making a contract, not only with the state, but also with fellow citizens as members of a society.<sup>68</sup> He explaining what should be the basis for this social system:

That instead of destroying natural inequality, the fundamental compact substitutes, for such physical inequality as nature may have set up between men, an equality that is moral and legitimate, and that men, who may be unequal in strength or intelligence, become every one equal by convention and legal right.<sup>69</sup>

The point Rousseau makes here is that man does not sacrifice his freedom as a result of the social contract, but because of it, he becomes more equal, and any existing inequalities may be addressed by the society.<sup>70</sup> Several manifestations of the social contract emerged in the centuries that followed Rousseau's work, his focus on equality is particularly universal. While critics like David Hume disagreed with the idea that the origins of government is based on some actual agreement and the claim that citizens continue to endorse or agree to government today.<sup>71</sup> Others like John Rawl acknowledged the idea of a social contract in describing political association based on some sort of consent, though he rejected the literal contractual basis for political authority.<sup>72</sup>

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<sup>67</sup> Jean-Jacques Rousseau., *The Social Contract* (1968, Penguin Classics)

<sup>68</sup> Gilmore B., 'American Rousseau: Barack Obama and the Social Contract', (2010) 35 *Thurgood Marshall Law Review*.9.

<sup>69</sup> Rousseau, *The Social Contract*, (1968) p.19.

<sup>70</sup> Gilmore B., 'American Rousseau: Barack Obama and the Social Contract', (2010).

<sup>71</sup> See David Hume, 'Of the Original Contract [1748]', in Ernest Baker (ed), *Social Contract: Essays by Locke, Hume and Rousseau* (OUP 1962) 147

<sup>72</sup> Rawls J., *A Theory of Justice* (1972, Oxford Clarendon Press). See also Chesterman, *One Nation under Surveillance*. p 249.

Admittedly, the idea behind the concept of a social contract is not a suicide pact; friends and families of casualties of terrorist acts would be less worried about theoretical concepts. Laurence Tribe put it succinctly when he wrote that in normal times, it may be right to allow a hundred guilty defendants to go free than to convict an innocent one, but that when one of those guilty ones may blow up the rest of the country, we have to reconsider that arithmetic.<sup>73</sup> That said, some actions are so damaging to the idea of a fair and just society, so ruinous to the notion of equality and so contrary to basic morals that they ought to amount to breaches of trust or contract.

If in the interest of security, civil liberties and individual rights, equality before the law, innocent until proven guilty and many other basic liberties that constitute the major fabric of a democracy are going to be set aside, then the general public has to make that choice collectively. The security of the many for the liberty of a few is unacceptable, suspicion and profiling on the basis of ethnicity or religion is intolerable. Whatever part any society chooses, the consent of a large majority must be a requirement, the content of the rules, the detailed terms of the bargain will of course depend on the culture and politics of the society in question. However, lawless extra judicial killing of a citizen under the guise of 'our interest' is abhorrent and despicable.<sup>74</sup> It calls for a complete re-negotiation about the kind of actions members of the public are consenting to and the kind of society they choose to belong to.

### ***A New Social Contract to Defend Liberty***

Bruce Ackerman advocated that an emergency constitution be developed in the United States that provides for effective and short term responses but draws a line at permanently restricting civil liberties. He suggested temporal restrictions that deal with the requirement of immediate response by the Executive but will need the greater legitimacy of the Legislature. He recommended that the powers granted to the Executives would require the support of a majority of Congress after one or two weeks, it would then lapse after two months unless re-authorised by Sixty percent of congress; Seventy percent two months later and Eighty percent to extend for another two month period. He termed this the 'Supermajoritarian escalator'.<sup>75</sup> It suggests an approach that regulates government response to threats and attacks as well as recognising the dangers of normalising exceptional state of affairs.

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<sup>73</sup> Tribe L.H., 'Trial by Fury', *The New Republic*, 10 December 2001.

<sup>74</sup> See Jo Becker and Scott Shane., 'Secret 'Kill List' Proves a Test of Obama's Principles and Will' *The New York Times*, 29 May 2012, 2; Jeremy Scahill 'The killing of Anwar al-Awlaki and his Teenage Son' *The Nation*, 25 April 2013, available at <https://www.commondreams.org/view/2013/04/25-9>.

<sup>75</sup> Ackerman B., *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2006, Yale University Press) p.80-3.



Similarly, Professor Oren Gross argued for an ideal of extra-legal measures whereby government officials are allowed to act outside of the established laws when they believe that it is essential to do so for the protection of the nation and the public and that to do otherwise would be calamitous, but only if the nature of their actions are acknowledged openly and publicly. Thereafter, the people can decide on whether to hold such an official responsible, or otherwise approve of their action, thereby absolving them of the normal consequences that would have followed their actions.<sup>76</sup> Using the Social contract in a broader sense, it is necessary to frame the relevant choices: having rejected as false and misleading, the choice between security and liberty. This new contract will be a dynamic negotiation, between the governor and the governed that, in order to remain legitimate, must be based on some measure of consent and transparency.<sup>77</sup>

Simon Chesterman reduced this to three basic ideas. First and most fundamental is the consensual premise of a contract. Powers necessary for the protection of the State must be exercised in public. This requirement of publicness concedes that exercising such powers has limits and it ensures that the justification for their continued use will be fought over in the political process. There will obviously be differing answers to where the line should be drawn in violating civil liberties based in part by differing opinions on what constitutes a good life. It is possible that some will prefer a more secure, less dangerous world at the expense of significant limit on liberty while others would choose liberty even if the cost is living a little less comfortably or more dangerously. The author has argued that it is impossible to guarantee a 100 percent security, but each political community must come to that conclusion on their own. Second is the implied notion of a formal agreement. The powers and the entities tasked with exercising it must be enshrined in law. Whatever powers granted for national security claims must be accompanied by a variety of accountability mechanisms, with clear rules concerning what can be done domestically and abroad. This will make clear that there are limits to what the government can do and what the public will accept. The third goes to the sole purpose of a contract; accountability for the activities of people and institutions entrusted with these powers must be consequence driven. Obvious and trite as this might seem, societies founded on the rule of law has not always lived up to them.<sup>78</sup>

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<sup>76</sup> Gross O., 'Responses and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) *Yale Law Journal* p.112. This has been developed in a book written in conjunction with Fionnuala Ni Aolain: *Law in Times of Crisis, Emergency Powers in Theory and Practice* (2006, Cambridge University Press).

<sup>77</sup> Chesterman, *One Nation under Surveillance* p.248.

<sup>78</sup> Chesterman, *One Nation under Surveillance*, (2011) pp.254-255.

Society might accept that the measures put in place satisfy the requirements of consent and fairness in our polity, or it might think differently, that those measures, while unfair, must nevertheless be adopted to increase safety. If she chooses the first conclusion, we would deem treating those 'suspected' of terrorism, or seen as 'dangerous' as justified. If she, however, comes to the latter conclusion and accepts to treat some members of society unfairly, a more scrutinising approach should be demanded from the State, every such move must be mitigated as much as it is practicable to do so, government must show that such conduct is absolutely essential for each individual, one by one. When a member or group of the society is treated unfairly for the safety of the rest, a level of consideration that is consistent with that safety is owed to them.<sup>79</sup>

## **Conclusion**

It has been the argument of the author that security and liberty are interdependent ideals, one needs the other to be fully enjoyed. The hypothesis of trading one for the other or balancing is misleading. However, it is not expected that there will be a consensus amongst the many schools of thoughts on the tensions between State security and individual liberties. The author will admit that it is possible that liberty might lose in a battle between the two, each political society has to make its own resolution. Nevertheless, arrogating more power to the State and its institutions does not automatically translate to an extinction of all terrorism threats, and there is a universal acknowledgement that these threats will continue to be a part of everyday life for the foreseeable future. Also, with the diminution of liberties comes the increased risk of the State abusing the extra power given to it, as well as its ability to act oppressively. While the threats from terrorism are to be taken seriously, it is a grave mistake to confuse the means with the end. Liberties must not be traded for vague promises of safety.

Liberty and Security can be reconciled, but it has to be done within the existing legal framework. Civil rights and civil liberty are not mutually exclusive; one cannot be sacrificed for the other. Democratic societies do not see all means as acceptable, even if that means it must sometimes fight with one hand tied behind its back. The rule of law and individual liberties constitute an important aspect of security, they strengthen its spirit and the strength allows it to overcome difficulty. There is no doubt that in the long term, it will be of great value to society to recourse to upholding the rule of law.

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<sup>79</sup> Dworkin, *The threat to Patriotism*.